

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SHERRY L. COLLINS,
Appellant,

v.

DEFENSE LOGISTICS AGENCY,
Agency.

DOCKET NUMBER
PH0752920255I1

DATE: SEP 24 1992

Sherry L. Collins, Philadelphia, Pennsylvania, pro se.

Judith R. Robbins, Esquire, Philadelphia, Pennsylvania,
for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of an initial decision dismissing her appeal as outside the Board's jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

On February 14, 1992, the appellant filed an appeal with the Board's Philadelphia Regional Office in which she alleged that her December 20, 1991, resignation from the GS-9 position of contract specialist was involuntary and that she had been subject to unlawful discrimination and reprisal. Appeal File, Tab 1. In his acknowledgment order dated February 19, 1992, the administrative judge stated that the Board's jurisdiction was in doubt and that, unless the appellant amended her appeal to allege that her resignation was the result of duress, coercion, or misrepresentation by the agency, the appeal would be dismissed for lack of jurisdiction. *Id.*, Tab 2. The administrative judge ordered the appellant to submit evidence and argument to prove that the appeal was within the Board's jurisdiction within 15 days. *Id.* On March 11, 1992, the agency filed its response to the appellant's petition for appeal, and on March 16, 1992, it filed a motion to dismiss the appeal for lack of jurisdiction. *Id.*, Tab 5. The appellant did not respond to either the acknowledgment order or the agency's motion to dismiss.

In an initial decision dated April 13, 1992, the administrative judge found that the appellant failed to make a nonfrivolous allegation that her resignation was involuntary. He based his finding, at least in part, on evidence presented in the agency's response and the appellant's failure to counter that evidence. The administrative judge denied the

appellant's request for a hearing and dismissed the appeal for lack of jurisdiction.

In her petition for review, the appellant contends that she presented sufficient evidence to the administrative judge to constitute a nonfrivolous allegation that her resignation was involuntary, and she requests that her appeal be remanded for a hearing.

ANALYSIS

Generally, resignations are presumed to be voluntary actions and, thus, not appealable to the Board. An involuntary resignation, however, is tantamount to a removal and is therefore subject to the Board's jurisdiction. *Wilson v. Department of the Air Force*, 51 M.S.P.R. 212, 214 (1991); *Gettings v. Department of the Air Force*, 48 M.S.P.R. 502, 509 (1991). The presumption that a resignation was voluntary may be rebutted by evidence which shows that it was the result of duress or coercion, or was otherwise involuntary. *Id.*; *West v. U.S. Postal Service*, 44 M.S.P.R. 551, 561-62 (1990); *Beaty v. Department of Agriculture*, 24 M.S.P.R. 658, 661 (1984). To establish that a resignation was involuntary due to duress or coercion, the appellant must show that: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) the circumstances were the result of coercive acts of the opposite party. See *Burke v. Department of the Treasury*, 53 M.S.P.R. 434, 438 (1992); *Fletcher v. U.S. Postal Service*, 39 M.S.P.R. 380, 385 n.2

(1989); *Spiegel v. Department of the Navy*, 6 M.S.P.R. 31, 33 (1981).

The United States Court of Appeals for the Federal Circuit and the Board have held that, where an appellant makes a nonfrivolous allegation that the Board has jurisdiction over an appeal,¹ the appellant is entitled to a hearing on the jurisdictional question. *Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed. Cir. 1986); *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985); *Alvarez v. Department of the Air Force*, 48 M.S.P.R. 309, 311 (1991); *Schmidt v. U.S. Postal Service*, 39 M.S.P.R. 188, 192 (1988); *McGarigle v. U.S. Postal Service*, 36 M.S.P.R. 610, 614 (1988); *McCarthy v. Federal Aviation Administration*, 32 M.S.P.R. 100, 102 (1987).

In determining that the appellant failed to make a nonfrivolous allegation of jurisdiction in this case, the administrative judge considered, at least in part, affidavits from the appellant's supervisor and other agency employees denying the appellant's claim of reprisal and disparaging remarks directed at her. Initial Decision at note. The administrative judge stated that "the agency ... presented evidence tending to rebut the assertions made by the appellant

¹ Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a *prima facie* case that the Board has jurisdiction over the matter in issue. *Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed. Cir. 1986).

-- that she was forced to resign -- and the appellant has not challenged this evidence." *Id.*

We find that the administrative judge erred in considering the agency's evidence and the appellant's failure to respond to that evidence since, in establishing the right to a jurisdictional hearing, an appellant only has to make a nonfrivolous allegation of facts to support a prima facie case of involuntariness, independent of any showing by the agency, or any failure on the appellant's part to respond to the agency's evidence or to submit his own evidence. See *Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 893-94 (Fed. Cir. 1986); see also *Hill v. Department of the Air Force*, 796 F.2d 1469, 1472 (Fed. Cir. 1986). This error, however, did not prejudice the appellant's substantive rights because the ultimate decision finding no jurisdiction was correct.

The appellant's petition for appeal included a copy of her unsworn letter of resignation to the agency. That letter stated as follows:

Pressures resulting from recent conflicts addressed via EEO and AFCE have compounded the normally stressful environment I work in. This has created an atmosphere of such extreme tension that my physical condition has deteriorated alarmingly. This stress has caused gastrointestinal pain and bleeding, migraines, sleep disturbances, and upper respiratory problems, as well as contributing to gall bladder attacks. Inasmuch as I see no relief or protection available and I am in constant fear of reprisal, I feel that my continued employment here can only worsen my condition. Accordingly, I hereby resign my position, effective today, 91 DEC 20, at the end of my normal shift.

Appeal File, Tab 1.

The appellant also submitted an affidavit with her petition for appeal in which she described retaliation and discrimination allegedly directed at her in response to her testifying at the Board hearing of another employee, Deborah Haines. *Id.* The appellant averred that the day after her testimony her supervisor started retaliating against her. *Id.* According to the appellant, she requested a transfer to another supervisor, and although she was promised assignment to a different supervisor, she was assigned to Haines's former supervisor, who also treated her unfairly, including downgrading her performance. *Id.* In her affidavit, the appellant avers that she resigned because of the harassment she was experiencing.² *Id.*

The appellant's affidavit did not reiterate the allegations in her letter of resignation that she resigned because of health concerns. Nor, although given ample opportunity to do so, did she make any specific allegations before the administrative judge linking her health claims with the alleged harassment or showing the severity of her claimed ailments. Further, the appellant did not make allegations specifying particular acts of harassment, discrimination, or retaliation directed toward her.

² She also included with her petition for appeal a copy of an equal employment opportunity complaint that she had filed with the agency on July 23, 1991. Appeal File, Tab 1. It claims discrimination based on race and religion, and asks for corrective action in the form of upgrading her performance appraisal and transferring her laterally to a position with promotion potential in another work group. *Id.*

We find that the appellant has failed to allege sufficient specific facts which, if true, would show that she had no alternative to resignation. We therefore conclude that the appellant has failed to make a nonfrivolous allegation that her resignation was involuntary. Accordingly, the administrative judge properly dismissed the appeal for lack of jurisdiction without affording the appellant a jurisdictional hearing.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.